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5 Attorneys for Defendant
 INTERNATIONAL BUSINESS MACHINES
 6 CORPORATION

7

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10 CV 08 1198
 11 Case No.

12 JONATHAN ROSENOER,
 Plaintiff,
 v.
 13 INTERNATIONAL BUSINESS MACHINES
 CORPORATION, a New York corporation; and
 14 DOES 1 through 50,

15 NOTICE OF REMOVAL OF ACTION
 TO FEDERAL COURT
 [28 U.S.C. §§ 1441(a)]

16 Defendant.

17
 18 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
 19 DISTRICT OF CALIFORNIA:

20 PLEASE TAKE NOTICE that Defendant INTERNATIONAL BUSINESS
 21 MACHINES CORPORATION ("Defendant" or "IBM") hereby removes to this Court the state
 22 court action described below:

23 1. On December 28, 2007, Plaintiff JONATHAN ROSENOER ("Plaintiff")
 24 commenced the action entitled Jonathan Rosenoer v. International Business Machines
Corporation, a New York corporation; and DOES 1 through 50, by filing a complaint
 25 ("Complaint") against Defendant in the Superior Court of the State of California, County of San
 26 Francisco, Case No. CGC 07-470547.

27 2. Plaintiff's Complaint alleges the following causes of action: (1) recovery

1 of unpaid wages pursuant to California Labor Code Section 201; (2) waiting time penalties
 2 pursuant to California Labor Code Section 203; and (3) breach of employment agreement.

3 3. Defendant first received a copy of the Complaint on January 31, 2008,
 4 when Defendant was served with a copy of the Summons and Complaint. A copy of the
 5 Summons and Complaint are attached hereto as **Exhibit A**. A true copy of the case file from the
 6 San Francisco Superior Court, which includes an additional copy of the Complaint, as well as
 7 Defendant's timely filed Answer to the Complaint, is attached hereto collectively as **Exhibit B**.

8 4. This Notice of Removal has been timely filed under 28 U.S.C. Section
 9 1446(b) because it was filed within 30 days after Defendant's receipt of Plaintiff's Complaint.

10 5. No further proceedings have occurred in the state action, other than the
 11 filing of the Complaint and Answer.

12 6. This action is a civil action of which this Court has original jurisdiction
 13 under 28 U.S.C. Section 1332(a), and is one which may be removed to this Court by Defendant
 14 pursuant to the provisions of the 28 U.S.C. Section 1441(a) in that, as shown below, it is a civil
 15 action between citizens of different states and the matter in controversy exceeds the sum of
 16 \$75,000, exclusive of interest and costs.

17 7. Without conceding that Plaintiff is entitled to damages or could recover
 18 damages in any amount, the amount in controversy in this action exceeds \$75,000 based on the
 19 following:

- 20 a. Plaintiff seeks unpaid wages pursuant to California Labor Code Section 201.
 Specifically, Plaintiff claims he is owed the remaining portion of his 2006
 annual incentive bonus in the amount of \$69,375.00. (Complaint, ¶¶14-19)
- 21 b. Plaintiff also seeks waiting time penalties for the unpaid bonus amount
 pursuant to California Labor Code Section 203. Without conceding
 Plaintiff's entitlement to such penalties or the accuracy of his calculation,
 Plaintiff claims he is entitled to \$7,602 in penalties for Defendant's alleged
 failure to pay the remaining portion of his annual incentive bonus.
 (Complaint, ¶¶ 22 – 24)

1 c. Finally, Plaintiff seeks damages in the amount of at least \$11,010.00 for
2 alleged breach of employment contract arising from Defendant's alleged
3 cancellation of Plaintiff's sale of stock following his departure from the
4 Company in January 2007. Plaintiff claims the value of the IBM stock at the
5 time of the alleged sale was at least \$11,010.00, and is entitled to greater
6 sums subject to proof at the time of trial. (Complaint, ¶¶ 26 – 29)

7 d. Plaintiff also seeks an unspecified amount of attorney's fees pursuant to
8 California Labor Code Section 218.5. (Complaint, ¶ 20) "Attorney's fees
9 may be included in the amount of controversy if recoverable by statute or
10 contract." *Simmons v. PCR Technology*, 209 F. Supp.2d 1029, 1034 (N.D.
11 Cal. 2002).

12 8. This action is between citizens of different states, in that Defendant IBM
13 is informed and believes that Plaintiff Jonathan Rosenoer was at the time the action commenced,
14 and still is, a citizen of the State of California, and currently residing and working in the country
15 of Luxembourg.

16 9. Defendant IBM was at the time the action commenced, and still is, a
17 citizen of the State of New York under 28 U.S.C. Section 1332(c), in that its principal place of
18 business was, and still is, in the State of New York. IBM is a multinational computer
19 technology corporation that manufactures and sells computer hardware and software, and offers
20 infrastructure services, hosting services, and consulting services in areas ranging from
21 mainframe computers to nanotechnology. IBM is headquartered in Armonk, New York.

22 10. The inclusion of "Doe" defendants in the state court complaint has no
23 effect on removability. In determining whether diversity of citizenship exists, only the named
24 defendants are considered. 28 U.S.C. Section 1441(a).

25 11. Venue is proper in the United States District Court for the Northern
26 District of California pursuant to 28 U.S.C. Section 1441(a) and Section 1391(a) because the
27 state action was filed in San Francisco County, a county within this judicial district, and the
28 action arose within this judicial district.

1 12. For all the foregoing reasons, this Court has original jurisdiction over this
2 matter under 28 U.S.C. Sections 1332 and 1441(a).

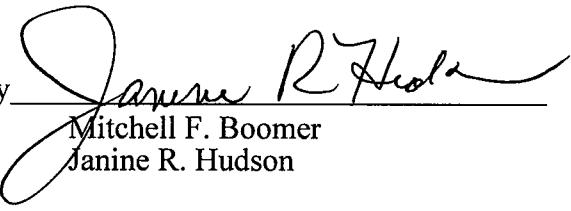
3 WHEREFORE, Defendant prays that the above action now pending against it in
4 the Superior Court for the State of California, County of San Francisco, be removed to this
5 Court.

6
7 DATED: February 28, 2008

Respectfully submitted,

8 JACKSON LEWIS LLP

9 By

10 
11 Mitchell F. Boomer
Janine R. Hudson

12 Attorneys for Defendant
13 INTERNATIONAL BUSINESS MACHINES
14 CORPORATION

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EXHIBIT A

CT CORPORATION
A WoltersKluwer Company

**Service of Process
Transmittal**

01/31/2008

CT Log Number 513039118



TO: Alec S Berman, Attorney
IBM Corporation
1133 Westchester Avenue, MD-140
White Plains, NY 10604

RE: **Process Served in California**

FOR: International Business Machines Corporation (Domestic State: NY)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Jonathan Rosenoer, etc., Plf. vs. International Business Machines Corporation, etc., et al., Dfts.
DOCUMENT(S) SERVED:	Summons, Complaint, Exhibit(s), Attachment(s), Stipulation Form, Statement Form
COURT/AGENCY:	San Francisco County- San Francisco, Superior Court, CA Case # CGC07470547
NATURE OF ACTION:	Employee Litigation - Unpaid waged - Seeking Amount \$69,375.00
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Process Server on 01/31/2008 at 15:10
APPEARANCE OR ANSWER DUE:	Within 30 days after service
ATTORNEY(S) / SENDER(S):	Darin T. Judd Lippenberger, Thompson, Welch, Soroko & Gilbert LLP 201 Tamal Vista Blvd. Corte Madera, CA 94925 415 927 5200
ACTION ITEMS:	Telephone, Alec S Berman , 914-642-5847 SOP Papers with Transmittal, via Fed Ex Standard Overnight . 798864747914
SIGNED:	C T Corporation System
PER:	Nancy Flores
ADDRESS:	818 West Seventh Street Los Angeles, CA 90017
TELEPHONE:	213-337-4615

Page 1 of 1 / JC

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

EXHIBIT A

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:**(AVISO AL DEMANDADO):**

INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation; and DOES 1 through 50, inclusive,

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
 JONATHAN ROSENOER, an individual

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estas formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte lo podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
 (El nombre y dirección de la corte es):
 Superior Court of California - San Francisco County
 400 McAllister Street

CASE NUMBER:
(Número del Caso): 131-017-470517

San Francisco, California 94102

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
 (El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Darin T. Judd
 (415) 927-5200
 Lippenberger, Thompson, Welch, Soroko & Gilbert LLP

201 Tamal Vista Blvd.
 Corte Madera, CA 94925

DATE: DEC 28 2007 Clerk, by Gordon Park-Li (Secretary) Deputy
 (Fecha) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
 (Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

[SEAL]

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):

3. on behalf of (specify):

under: CCP 416.10 (corporation)

CCP 416.20 (defunct corporation)

CCP 416.40 (association or partnership)

other (specify):

CCP 416.60 (i)

CCP 416.70 (i)

CCP 416.90 (i)

4. by personal delivery on (date):

1 DARIN T. JUDD (SBN 160475)
2 ERIC D. McFARLAND (SBN 214245)
3 LIPPENBERGER, THOMPSON, WELCH,
4 SOROKO & GILBERT LLP
5 201 Tamal Vista Blvd.
6 Corte Madera, CA 94925-1110
7 Telephone: (415) 927-5200
8 Facsimile: (415) 927-5210

ENDORSED
FILED
San Francisco County Superior Court
DEC 28 2007
GORDON PARK-LI, Clerk
BY: PARAM NATT
Deputy Clerk

Atorneys for Plaintiff
JONATHAN ROSENOER

MAY 30 2008 - 9 AM

DEPARTMENT 212

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY & COUNTY OF SAN FRANCISCO

JONATHAN ROSENOER, an individual,) NO. C60-07-470547

Plaintiff,) COMPLAINT FOR:

vs.)

INTERNATIONAL BUSINESS)
MACHINES CORPORATION, a New York)
corporation; and DOES 1 through 50,)
inclusive,)

1. Recovery of Unpaid Wages;
2. Waiting Time Penalties; and
3. Breach of Employment Agreement.

Defendant.)

Plaintiff alleges:

PARTIES

1. Plaintiff JONATHAN ROSENOER, is an individual, and former employee of defendant INTERNATIONAL BUSINESS MACHINES CORPORATION.

2. Plaintiff is informed and believes and thereon alleges that defendant INTERNATIONAL BUSINESS MACHINES CORPORATION ("IBM"), is a New York

1 corporation that is authorized and doing business in the State of California. IBM did business with
 2 Plaintiff in the State of California by hiring him as a Global Operational Resilience & Risk
 3 Executive in 2004, with Mr. ROSENOER working out of IBM's San Francisco, California office.

4 3. Plaintiff is ignorant of the true names and capacities of the Defendants sued as DOES
 5 1 through 50, and therefore, sues these Defendants by such fictitious names. Plaintiff will amend
 6 this complaint to allege their true names and capacities when they are ascertained.

7 4. At all times herein mentioned, each and every Defendant acted as the agent and/or
 8 employee of the other Defendants, and in doing things herein alleged was acting within the course
 9 and scope of such agency and/or employment and with the permission and consent of all co-
 10 Defendants.

GENERAL ALLEGATIONS

11 5. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
 12 through 4 of this complaint.

13 6. On or about March 9, 2004, IBM hired Mr. ROSENOER as an employee. Prior to
 14 Plaintiff beginning his employment, IBM confirmed in writing the terms of employment in a letter
 15 dated March 5, 2004. (A true and correct copy of the March 5, 2004 letter and attachment are
 16 attached hereto as **Exhibit A**, and incorporated herein by this reference.) The attachment included
 17 with the March 5, 2004 letter confirmed that IBM agreed to pay Plaintiff a base salary of \$185,000
 18 and an annual bonus of \$92,500, the bonus being paid on a quarterly basis. (See **Exhibit A**.) The
 19 attachment further confirms that as part of the terms of his employment, Mr. ROSENOER would
 20 also receive a stock option grant of 2,000 shares of IBM stock. (*Id.*)

21 7. Mr. ROSENOER began his employment with IBM on March 9, 2004. During the full
 22 course of his employment, Plaintiff was based out of the IBM company office located at 425 Market
 23 Street, San Francisco, California. The business cards, office phone, and mailing address for Mr.
 24 ROSENOER while employed by IBM were based out of IBM's Market Street office in San
 25 Francisco.

1 8. During the last few months of 2006, Plaintiff spoke with his supervisor, Phil Guido of
 2 IBM, about the fact that Plaintiff was inclined to leave his employment with IBM. In December of
 3 2006, Mr. ROSENOER advised Mr. Guido and later confirmed in writing that he would be leaving
 4 IBM to join a public accounting firm, KPMG, to be based outside of the United States, in
 5 Luxembourg. Mr. ROSENOER worked for IBM through the end of 2006. Plaintiff's last day of
 6 work at IBM was January 1, 2007.

7 9. After leaving IBM, Plaintiff requested payment of the entire bonus he earned for
 8 2006. IBM paid Mr. ROSENOER his bonus for the first quarter of 2006, but failed to pay him the
 9 balance due for 2006. The total sum unpaid and due to Plaintiff for his 2006 bonus is \$69,375.00.

10 10. On or about January 29, 2007, in response to Plaintiff's demand for payment of his
 11 bonus, IBM informed him in writing that it would not pay the remaining balance of the 2006 bonus
 12 earned by Plaintiff, claiming that Mr. ROSENOER had joined a "competitor." (A true and correct
 13 copy of the email from IBM is attached hereto as **Exhibit B**, and incorporated herein by this
 14 reference.) The email surprised Plaintiff because California law specifically prohibits
 15 noncompetition clauses from being enforced against California employees such as Plaintiff, and
 16 because in all Plaintiff's conversations with his direct manager, and at no time prior to that, had
 17 Plaintiff been advised that he would be ineligible for his 2006 bonus if he left the company after it
 18 was earned. Notwithstanding the fact that non-competes violate California law, Plaintiff was further
 19 surprised that IBM would seek to enforce a non-compete that was completely undefined, in terms of
 20 geographic scope or duration, or even in terms of who might be considered a competitor.

21 11. After receiving IBM's email response Plaintiff asked IBM for documentation
 22 specifying the definition of a "competitor." Plaintiff was told that there is no definition of a
 23 competitor that was available for him to review. Plaintiff inquired further, but received no answer,
 24 as to how he would be in competition working for a public audit firm, KPMG, as opposed to the
 25 world's largest computer company. The absurdity of IBM's belated and self-imposed "condition" is
 26 further illustrated on a geographic basis. Mr. ROSENOER accepting a position as a partner in a

1 Luxembourg firm is distinct from working in the United States as an employee of an American
 2 company. In an effort to informally resolve the unpaid bonus issue Plaintiff advised IBM that
 3 non-competition agreements are not valid and against public policy with reference to regular
 4 employees in California. IBM refused and failed to respond to this information.

5 12. Importantly, IBM's email response confirms that its improper denial is based solely
 6 upon the specious conclusion that Mr. ROSENOER went to work for a "competitor," and that there
 7 exists no other reason to withhold payment of the 2006 bonus Plaintiff earned.

8 13. Immediately after leaving IBM, Plaintiff used the IBM process to exercise the stock
 9 options granted to him, and to sell the IBM stock granted to him at hire. Plaintiff attempted to
 10 exercise the stock options and sell the stock within the timelines prescribed by IBM. However,
 11 Plaintiff was later informed that the sale had been cancelled because he had joined a "competitor."
 12 Again, Mr. ROSENOER was told that there is no definition of a competitor that IBM could refer him
 13 to. Plaintiff is informed and believes, and on that basis alleges, that the value of the stock IBM
 14 improperly cancelled and precluded him from selling was \$11,010.00 as of January 9, 2007.

15

FIRST CAUSE OF ACTION

(Recovery of Unpaid Wages)

16 14. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
 17 through 13 of this complaint.

18 15. Beginning on or about March 9, 2004 and continuing until January 1, 2007, Plaintiff
 19 was employed by defendant at defendant's office located in San Francisco, California, in the City &
 20 County of San Francisco.

21 16. Plaintiff's employment was pursuant to a written employment agreement. The terms
 22 of that agreement as related to Plaintiff's compensation were that IBM agreed to pay Plaintiff a base
 23 salary of \$185,000 and an annual bonus of \$92,500, the bonus being paid on a quarterly basis. (See
 24 Exhibit A.)

17. Effective January 2, 2007, Plaintiff resigned from his employment with IBM.

2 Plaintiff gave notice of his intent to resign in December of 2006.

3 18. On January 2, 2007, at the time that Plaintiff resigned, Plaintiff had last been paid
4 accrued wages related to his annual incentive bonus through June of 2006, and was owed wages for
5 the remaining unpaid portion of the 2006 annual incentive bonus in the amount of \$69,375.00, as
6 provided for in the employment agreement. (See **Exhibit A.**)

7 19. At the time of termination, defendant IBM failed to pay Plaintiff all of the amounts
8 due, as set forth in Paragraph 18. Defendant's failure to pay the full amount due Plaintiff on
9 termination violates the provisions of Labor Code Section 201. There is now due and owing to
10 Plaintiff the sum of \$69,375.00. Defendant has failed and refused, and continues to fail and refuse, to
11 pay the amount due, and greater sums subject to proof at the time of trial.

12 20. Pursuant to Labor Code Section 218.5, Plaintiff requests that the court award Plaintiff
13 reasonable attorney's fees and costs incurred by him in this action.

14 21. Pursuant to Labor Code Section 218.6, Plaintiff requests that the court award Plaintiff
15 interest on all due and unpaid wages, at the legal rate specified by Civil Code Section 3289(b),
16 accruing from the date the wages were due and payable.

17 WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set
18 forth fully in the prayer of this complaint.

SECOND CAUSE OF ACTION
(Waiting Time Penalties Under Labor Code Section 203)

21 22. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
22 through 13 of this complaint.

23. The defendant's failure to pay wages, as alleged in Paragraph 18, was willful in that
24 IBM informed Plaintiff that it would not pay the remaining balance of the 2006 bonus earned by
25 Plaintiff, claiming that Mr. ROSENOER had joined a "competitor." This contention is without merit.

1 or any good cause as IBM failed to provide any documentation related to Plaintiff's employment
2 agreement that allowed them to take its specious position, no one at IBM ever advised Plaintiff that a
3 condition to receive his 2006 incentive bonus precluded him from working for a "competitor," and
4 that IBM's unilaterally imposed "non-competition" agreement is invalid and against public policy
5 with reference to regular employees in California. Accordingly, IBM's failure and refusal to
6 promptly pay all of Plaintiff's wages at the time of his resignation entitling Plaintiff to penalties
7 under Labor Code Section 203, which provides that an employee's wages shall continue as a penalty
8 until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

9 24. Defendant failed to pay Plaintiff the sum of \$69,375.00 at the time of Mr.
10 ROSENOER's resignation, and has failed and refused to pay those sums for more than 30 thereafter.
11 Pursuant to the provisions of Labor Code Section 203, Plaintiff is entitled to a penalty in the amount
12 of \$7,602, which is his daily rate multiplied by 30 days.

13 WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set
14 forth fully in the prayer of this complaint.

**THIRD CAUSE OF ACTION
(Breach of Employment Agreement-Cancellation of Stock Options)**

17 25. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
18 through 13 of this complaint.

26. The terms of the offer of an employment tendered to Plaintiff by IBM expressly
20 states:

Your management has requested you receive a stock option grant of 2,000 shares of IBM stock to be granted during one of the three annual stock option grant cycles after your employment commences. The grant is subject to appropriate senior management approvals.

24 (See Exhibit A, page 3, second paragraph.) Plaintiff accepted the offer and began his employment
25 on March 9, 2004. IBM later granted the Mr. ROSENOER the promised stock option.

26 | //

1 27. After leaving IBM, Plaintiff exercised the stock options granted to him by IBM as part
2 of his compensation while an IBM employee. Following the exercise of the stock option granted
3 Plaintiff by IBM, Mr. ROSENOER attempted to sell the stock. However, Plaintiff was later
4 informed that the sale had been improperly cancelled by IBM, once again the stated reason being that
5 Plaintiff had joined a "competitor." IBM's cancellation of the stock options granted represents an
6 express breach of the terms of IBM's offer of employment accepted by Plaintiff when he began his
7 employment on March 9, 2004.

8 28. Plaintiff is informed and believes, and on that basis alleges, that the value of the stock
9 IBM improperly cancelled and precluded him from selling was \$11,010.00 as of January 9, 2007.
10 Accordingly, as a result of IBM improper cancelling of the stock options granted, Plaintiff has been
11 damaged at least \$11,010.00, and greater sums subject to proof at the time of trial.

12 29. Plaintiff fully performed all terms associated with the offer of employment tendered
13 to him, and related to the promised grant of a stock option from IBM for 2,000 shares of IBM stock.

14 WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set
15 forth fully in the prayer of this complaint.

PRAYER

17 WHEREFORE, Plaintiff JONATHAN ROSENOER demands judgment against Defendants,
18 and each of them, as to his Recovery of Unpaid Wages, as follows:

25 //

26 | //

1 As to Plaintiff's Second Cause of Action for Waiting Time Penalties demands judgment
2 against defendants as follows:

- 3 1. For penalties in the amount of \$7,602.00 pursuant to Labor Code Section 203;
- 4 2. For interest on the amount;
- 5 3. For reasonable attorney's fees pursuant to Labor Code Section 218.5;
- 6 4. For costs of suit incurred herein; and
- 7 5. For such other and further relief as the court may deem appropriate.

8 As to Plaintiff's Third Cause of Action for Breach of Contract demands judgment against
9 defendants as follows:

- 10 1. Compensatory damages in the amount of \$11,010.00, representing the value of the
11 stock IBM improperly cancelled and precluded Plaintiff from selling as of January 9,
12 2007.
- 13 2. For interest on the amount of \$11,010.00 from January 9, 2007;
- 14 3. For reasonable attorney's fees pursuant to Labor Code Section 218.5;
- 15 4. For costs of suit incurred herein; and
- 16 5. For such other and further relief as the court may deem appropriate.

17 DATED: December 27, 2007

LIPPENBERGER, THOMPSON, WELCH,
SOROKO & GILBERT LLP

19 By:

20 Darin T. Kidd
21 Attorneys for Plaintiff
22 JONATHAN ROSENOER

EXHIBIT A

Aug 30 07 02:00a

Jon. Ian Rosenoer

707-91 8200



3/9/04
9A5612

309 Commodo Road
Research Triangle Park, NC 27709

March 5, 2004

Jonathan Rosenoer
34 Meadowhill Drive
Tiburon, CA 94920

9A5612

3/9/04

Dear Jonathan:

Congratulations! We are delighted that you have decided to join IBM.

Attached are the details of your offer, start date and other key information for your first day of employment.

We encourage you to access IBM's Pre-employment Connections site prior to your start date. The site has been designed to provide you with the tools and resources necessary to onboard and get connected fast. Find out more by accessing the website at:

http://www.ibm.com/employment/us/newhire/regular_welcome.shtml

Please contact us immediately if you have any questions.

Sincerely,

Maryellen Phipps

Karey Phipps
Staffing, 800-334-0435 x 64474

CC June Y. Felix

Attachment

Aug 30 07 02:00a

Jonathan Rosenoer

707-90 8200

p.2

March 5, 2004

Attachment to the IBM offer letter to Jonathan Rosenoer for the position of Global Operational Resilience & Risk Executive reporting to June Y. Felix.

The elements of your employment offer are:

This position provides you the opportunity to participate in IBM's Solution Sales Incentive Plan. Under this incentive plan, and based on a full year of employment with IBM, your annual on-target earnings (OTE) is estimated to be \$277,500.00. This is the sum of your base salary and target incentive (T/I). This target assumes you achieve 100 percent of your Personal Contribution Objectives as set by your manager and could also include a business performance element. For your reference, your annual base salary is \$185,000.00 and your target incentive is \$92,500.00.

IBM's incentive plan is designed to drive results focusing on growth and market share. Over-achievement of your incentive objectives can result in significant upside earnings. Incentive payments are earned quarterly.

An internal calculation is made that determines what the base salary would be for your position if you weren't on an incentive plan. In your case, this is a monthly salary of \$15,416.70, prorated based on your start date. Those times you aren't eligible for an incentive plan include your first partial month of employment, if you are in training, waiting for a territory assignment, or moving to a position not on an incentive plan. In addition, the internal salary calculation is also used to determine your benefits package.

The IBM company's obligation to make any payment under the Incentive Plan is subject to the condition that you are an active employee of the Company at the end of the period being measured. The exceptions are retirement under a Company Plan, approved leave of absence, death or medical disability. Full details on the terms and conditions of the IBM Sales Incentive Plan will be made available to you upon joining IBM. IBM reserves the right to modify or cancel this program at any time.

As has been discussed, it is not imperative that you relocate to the New York-area at this time. Because of the global nature of your responsibilities, you will need to travel a significant amount of time. However, we may mutually determine over the course of the next year that it would be preferable to have you relocate to the New York-area to more effectively perform in your role. In the event that we come to that conclusion, we will offer you the IBM Mobility Plan in effect at that time.

You will also have the opportunity to participate in IBM benefits. This is an exempt position which means you will not be entitled to overtime compensation. For detailed information on IBM Health Care benefits, visit the Health Care Benefits at IBM site at <http://www.ibm.com/employment/us/benefits/>.



Aug 30 07 02:01a

Jan . han Rosendoer

707-9. 8200

P.3

If you have additional benefits questions after visiting our website, please contact the Employee Services Center at 1-800-796-9876. The Employee Services Center is available weekdays from 8 a.m. to noon, and 2 p.m. to 8 p.m. Eastern time. The text telephone (TTY) at 1-800-426-6537 is available from 8 a.m. to 6 p.m.

Your management has requested you receive a stock option grant of 2,000 shares of IBM stock to be granted during one of three annual stock option grant cycles after your employment commences. The grant is subject to appropriate senior management approvals. Under our plans, options are granted at a price per share determined on the grant date. Stock options are subject to the terms and conditions of the award agreement and the associated Long-Term Performance Plan, which will be provided to you along with additional details, following the date of your grant.

We anticipate your start date to be March 9, 2004.

On your first day of employment, please report to 425 Market St., San Francisco, California. You will meet with Ray Cartwright to complete your paperwork. For further details, please contact Ray at (408) 927-1475.

As is customary at IBM, this offer is contingent upon the completion of our preemployment process: verification of your application materials and your ability to work for IBM without restriction (which means you do not have non-compete obligations or other restrictive clause with your current or former employer; or any non-compete or other restrictions have been disclosed by you and resolved to IBM's satisfaction). In the event the position you are being considered for requires you to operate an IBM owned/leased vehicle, your offer is also contingent upon a review of your driving record. Your employment with IBM will not begin until you have successfully cleared this process.

Your employment is also contingent upon your compliance with the U.S. immigration law. The law requires you to complete the U.S. Government Employment Eligibility Verification form (I-9), and to provide on your first day of employment documents that verify your identity and employment eligibility. For a list of the acceptable documents, refer to the enclosed sample. You must bring the appropriate documentation with you on your first day, as you will be unable to start work without them.

On your first day of employment you will be provided with a copy of IBM's Drug Free Workplace statement as well as a copy of IBM's drug and alcohol testing policy. In addition, you will be required to sign IBM's form regarding confidential information and intellectual property. If you would like to review or discuss this document in advance, please contact me.

IBM employees are required to comply with IBM's Business Conduct Guidelines and to certify that they have read them. Regular IBM employees should also read the current version of the on-line booklet, About Your Job (especially the section entitled Harassment & Inappropriate Behavior) and of the various on-line About Your Benefits



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Jon . han Rosendoer

707-9 8200

p. 4

(AYB) booklets, which together replace the content of all prior IBM employee handbooks. You will receive some of these documents in hard copy form during your new employee orientation. Once you have authorized access to the IBM Intranet, you will be able to read and/or print the contents of these documents, via Formal HR Documents on the HR Homepage (<http://w3.ibm.com/hr>). You may also ask your manager to print a copy for you.

Please read Attachments A&B which refer to IBM's affirmative action programs for individuals with disabilities, special disabled veterans, veterans of the Vietnam era, or Other Covered Veterans included under the amended Veterans Employment Opportunities Act of 1998.

To facilitate the process of transmitting your salary and other compensation payments to you on a timely basis, please bring, if available, your bank/financial institution account information to designate where you want your funds directly deposited via Electronic Funds Transfer.

IBM

EXHIBIT B

Aug 30 07 02:03a Jon .ian Rosenoer 707-91 8200 P. 1
4501

Lori Kantor

From: jonathan rosenoer [jrosenoer@gmail.com]
Sent: Monday, January 29, 2007 6:57 AM
To: Lori Kantor
Subject: Fwd: IBM response

----- Forwarded message -----
From: RUSSELL E MANDEL <mandel@us.ibm.com>
Date: Jan 29, 2007 4:59 AM
Subject:
To: jonathan rosenoer <jrosenoer@gmail.com>

Dear Mr. Rosenoer,

I have investigated your concerns regarding your "incentive/bonus" payout for your performance in 2006. I have found that you received your incentive through June in accordance with the Solution Sales Incentive Plan that you were on through June, 2006. I also found that you were fairly placed on the 2006 "U.S. Performance Bonus Program" when you transferred positions in June 2006; and that you were correctly denied a performance bonus in that you joined an IBM competitor when you resigned and as the performance bonus plan document states "...at any time prior to receiving a performance bonus payment, employees who render service to any organization...that is competitive to or in conflict with the interests of IBM, as determined solely by IBM, will not be eligible for a performance bonus payment in 2007 for the 2006 plan year."

While I know this is not the answer you had hoped for, please accept my best wishes for the future.

Russell E. Mandel
Consulting Human Resources Professional
Global Employee Relations
MD 4303
Route 100, Somers, N.Y., 10589
914-766-4170 (t/l 826-4170); Fax: 914-766-8461

EXHIBIT B

**SUMMONS
(CITACION JUDICIAL)**

SUM-100

NOTICE TO DEFENDANT:**(AVISO AL DEMANDADO):**

INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation; and DOES 1 through 50, inclusive,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

YOU ARE BEING SUED BY PLAINTIFF:**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

JONATHAN ROSENOER, an individual

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of California - San Francisco County
400 McAllister Street

CASE NUMBER:
(Número del Caso):

100-07-470547

San Francisco, California 94102

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Darin T. Judd

(415) 927-5200

Lippenberger, Thompson, Welch, Soroko & Gilbert LLP
201 Tamal Vista Blvd.

Corte Madera, CA 94925

DATE: DEC 28 2007

Gordon Park-Li

Clerk, by _____
(Secretario)

P. NATT

J. Nutt
Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

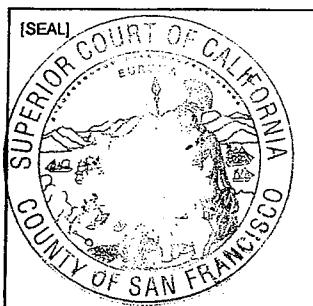
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):

under:	<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
	<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
	<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
	<input type="checkbox"/> other (specify):	

4. by personal delivery on (date):



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

Darin T. Judd (SBN 160475)
 Lippenberger, Thompson, Welch, Soroko & Gilbert LLP
 201 Tamal Vista Blvd.

Corte Madera, CA 94925
 TELEPHONE NO.: (415) 927-5200 FAX NO.: (415) 927-5210
 ATTORNEY FOR (Name): JONATHAN ROSENOER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco
 STREET ADDRESS: 400 McAllister Street
 MAILING ADDRESS:
 CITY AND ZIP CODE: San Francisco, California 94102
 BRANCH NAME:

CASE NAME: JONATHAN ROSENOER v. INTERNATIONAL BUSINESS MACHINES CORPORATION

CIVIL CASE COVER SHEET

Unlimited Limited
 (Amount demanded exceeds \$25,000) (Amount demanded is \$25,000 or less)

Complex Case Designation

Counter Joinder

Filed with first appearance by defendant
 (Cal. Rules of Court, rule 3.402)

CASE NUMBER:

CGC-07-470547

JUDGE:

DEPT:

DEC 28 2007
GORDON PARK-LI, Clerk
 BY: *Parham Natt*
 Deputy Clerk

Items 1-5 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort

Auto (22)
 Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
 Product liability (24)
 Medical malpractice (45)
 Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

Business tort/unfair business practice (07)
 Civil rights (08)
 Defamation (13)
 Fraud (16)
 Intellectual property (19)
 Professional negligence (25)
 Other non-PI/PD/WD tort (35)

Employment

Wrongful termination (36)
 Other employment (15)

Contract

Breach of contract/warranty (06)
 Collections (09)
 Insurance coverage (18)
 Other contract (37)

Real Property

Eminent domain/inverse condemnation (14)
 Wrongful eviction (33)
 Other real property (26)

Unlawful Detainer

Commercial (31)
 Residential (32)

Drugs

Judicial Review

Asset forfeiture (05)
 Petition re: arbitration award (11)
 Writ of mandate (02)
 Other judicial review (39)

Provisionally Complex Civil Litigation

(Cal. Rules of Court, rules 3.400-3.403)

Antitrust/Trade regulation (03)
 Construction defect (10)
 Mass tort (40)
 Securities litigation (28)
 Environmental/Toxic tort (30)
 Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

Enforcement of judgment (20)

Miscellaneous Civil Complaint

RICO (27)
 Other complaint (not specified above) (42)

Miscellaneous Civil Petition

Partnership and corporate governance (21)
 Other petition (not specified above) (43)

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. Large number of separately represented parties d. Large number of witnesses
 b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
 c. Substantial amount of documentary evidence f. Substantial postjudgment judicial supervision

3. Type of remedies sought (check all that apply):

a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): Three

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: December 28, 2007

Darin T. Judd (SBN 160475)

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers

If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 5 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary cause of action**. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. You do not need to submit a cover sheet with amended papers. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Complex Cases

In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage/Wrongful Death
Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/
Wrongful Death
Product Liability (*not asbestos or toxic/environmental*) (24)
Medical Malpractice (45)
Medical Malpractice—
Physicians & Surgeons
Other Professional Health Care
Malpractice
Other PI/PD/WD (23)
Premises Liability (e.g., slip
and fall)
Intentional Bodily Injury/PD/WD
(e.g., assault, vandalism)
Intentional Infliction of
Emotional Distress
Negligent Infliction of
Emotional Distress
Other PI/PD/WD

Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business
Practice (07)
Civil Rights (e.g., discrimination,
false arrest) (*not civil
harassment*) (08)
Defamation (e.g., slander, libel)
(13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice
(*not medical or legal*)
Other Non-PI/PD/WD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract (*not unlawful detainer
or wrongful eviction*)
Contract/Warranty Breach—Seller
Plaintiff (*not fraud or negligence*)
Negligent Breach of Contract/
Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open
book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections
Case
Insurance Coverage (*not provisionally
complex*) (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse
Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property (*not eminent
domain, landlord/tenant, or
foreclosure*)

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) (*if the case involves illegal
drugs, check this item; otherwise,
report as Commercial or
Residential*)

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court
Case Matter
Writ—Other Limited Court Case
Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor
Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400-3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims
(*arising from provisionally
complex case type listed above*)
(41)

Enforcement of Judgment

Enforcement of Judgment (20)
Abstract of Judgment (Out of
County)
Confession of Judgment (*non-
domestic relations*)
Sister State Judgment
Administrative Agency Award
(*not unpaid taxes*)
Petition/Certification of Entry of
Judgment on Unpaid Taxes
Other Enforcement of Judgment
Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint (*not specified
above*) (42)
Declaratory Relief Only
Injunctive Relief Only (*non-
harassment*)
Mechanics Lien
Other Commercial Complaint
Case (*non-tort/non-complex*)
Other Civil Complaint
(*non-tort/non-complex*)

Miscellaneous Civil Petition

Partnership and Corporate
Governance (21)
Other Petition (*not specified above*)
(43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult
Abuse
Election Contest
Petition for Name Change
Petition for Relief from Late
Claim
Other Civil Petition

1 DARIN T. JUDD (SBN 160475)
2 ERIC D. McFARLAND (SBN 214245)
3 LIPPENBERGER, THOMPSON, WELCH,
4 SOROKO & GILBERT LLP
5 201 Tamal Vista Blvd.
Corte Madera, CA 94925-1110
Telephone: (415) 927-5200
Facsimile: (415) 927-5210 CASE MANAGEMENT CONFERENCE SET BY: *A. Natt*

SUMMONS ISSUED
FILED
San Francisco County Superior Court

DEC 28 2007

GORDON PAMA-LI, Clerk
A. Natt
Deputy Clerk

6 Attorneys for Plaintiff
JONATHAN ROSENOER

MAY 30 2008 - 9 AM

P. NATT

7 DEPARTMENT 212
8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10
11 IN AND FOR THE CITY & COUNTY OF SAN FRANCISCO

12 JONATHAN ROSENOER, an individual,

13 NO. CGC-07-470547

14 Plaintiff,

15 vs.

16 INTERNATIONAL BUSINESS
17 MACHINES CORPORATION, a New York
corporation; and DOES 1 through 50,
inclusive,

18 Defendant.

19
20 COMPLAINT FOR:

21
22 1. Recovery of Unpaid Wages;
2. Waiting Time Penalties; and
3. Breach of Employment
Agreement.

23 Plaintiff alleges:

24 PARTIES

25 1. Plaintiff JONATHAN ROSENOER, is an individual, and former employee of
defendant INTERNATIONAL BUSINESS MACHINES CORPORATION.

26 2. Plaintiff is informed and believes and thereon alleges that defendant
INTERNATIONAL BUSINESS MACHINES CORPORATION ("IBM"), is a New York

1 corporation that is authorized and doing business in the State of California. IBM did business with
 2 Plaintiff in the State of California by hiring him as a Global Operational Resilience & Risk
 3 Executive in 2004, with Mr. ROSENOER working out of IBM's San Francisco, California office.

4 3. Plaintiff is ignorant of the true names and capacities of the Defendants sued as DOES
 5 1 through 50, and therefore, sues these Defendants by such fictitious names. Plaintiff will amend
 6 this complaint to allege their true names and capacities when they are ascertained.

7 4. At all times herein mentioned, each and every Defendant acted as the agent and/or
 8 employee of the other Defendants, and in doing things herein alleged was acting within the course
 9 and scope of such agency and/or employment and with the permission and consent of all co-
 10 Defendants.

GENERAL ALLEGATIONS

11 5. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
 12 through 4 of this complaint.

13 6. On or about March 9, 2004, IBM hired Mr. ROSENOER as an employee. Prior to
 14 Plaintiff beginning his employment, IBM confirmed in writing the terms of employment in a letter
 15 dated March 5, 2004. (A true and correct copy of the March 5, 2004 letter and attachment are
 16 attached hereto as Exhibit A, and incorporated herein by this reference.) The attachment included
 17 with the March 5, 2004 letter confirmed that IBM agreed to pay Plaintiff a base salary of \$185,000
 18 and an annual bonus of \$92,500, the bonus being paid on a quarterly basis. (See Exhibit A.) The
 19 attachment further confirms that as part of the terms of his employment, Mr. ROSENOER would
 20 also receive a stock option grant of 2,000 shares of IBM stock. (*Id.*)

21 7. Mr. ROSENOER began his employment with IBM on March 9, 2004. During the full
 22 course of his employment, Plaintiff was based out of the IBM company office located at 425 Market
 23 Street, San Francisco, California. The business cards, office phone, and mailing address for Mr.
 24 ROSENOER while employed by IBM were based out of IBM's Market Street office in San
 25 Francisco.

1 8. During the last few months of 2006, Plaintiff spoke with his supervisor, Phil Guido of
2 IBM, about the fact that Plaintiff was inclined to leave his employment with IBM. In December of
3 2006, Mr. ROSENOER advised Mr. Guido and later confirmed in writing that he would be leaving
4 IBM to join a public accounting firm, KPMG, to be based outside of the United States, in
5 Luxembourg. Mr. ROSENOER worked for IBM through the end of 2006. Plaintiff's last day of
6 work at IBM was January 1, 2007.

7 9. After leaving IBM, Plaintiff requested payment of the entire bonus he earned for
8 2006. IBM paid Mr. ROSENOER his bonus for the first quarter of 2006, but failed to pay him the
9 balance due for 2006. The total sum unpaid and due to Plaintiff for his 2006 bonus is \$69,375.00.

10 10. On or about January 29, 2007, in response to Plaintiff's demand for payment of his
11 bonus, IBM informed him in writing that it would not pay the remaining balance of the 2006 bonus
12 earned by Plaintiff, claiming that Mr. ROSENOER had joined a "competitor." (A true and correct
13 copy of the email from IBM is attached hereto as Exhibit B, and incorporated herein by this
14 reference.) The email surprised Plaintiff because California law specifically prohibits
15 noncompetition clauses from being enforced against California employees such as Plaintiff, and
16 because in all Plaintiff's conversations with his direct manager, and at no time prior to that, had
17 Plaintiff been advised that he would be ineligible for his 2006 bonus if he left the company after it
18 was earned. Notwithstanding the fact that non-competes violate California law, Plaintiff was further
19 surprised that IBM would seek to enforce a non-compete that was completely undefined, in terms of
20 geographic scope or duration, or even in terms of who might be considered a competitor.

21 11. After receiving IBM's email response Plaintiff asked IBM for documentation
22 specifying the definition of a "competitor." Plaintiff was told that there is no definition of a
23 competitor that was available for him to review. Plaintiff inquired further, but received no answer,
24 as to how he would be in competition working for a public audit firm, KPMG, as opposed to the
25 world's largest computer company. The absurdity of IBM's belated and self-imposed "condition" is
26 further illustrated on a geographic basis. Mr. ROSENOER accepting a position as a partner in a

1 Luxembourg firm is distinct from working in the United States as an employee of an American
2 company. In an effort to informally resolve the unpaid bonus issue Plaintiff advised IBM that
3 non-competition agreements are not valid and against public policy with reference to regular
4 employees in California. IBM refused and failed to respond to this information.

5 12. Importantly, IBM's email response confirms that its improper denial is based solely
6 upon the specious conclusion that Mr. ROSENOER went to work for a "competitor," and that there
7 exists no other reason to withhold payment of the 2006 bonus Plaintiff earned.

8 13. Immediately after leaving IBM, Plaintiff used the IBM process to exercise the stock
9 options granted to him, and to sell the IBM stock granted to him at hire. Plaintiff attempted to
10 exercise the stock options and sell the stock within the timelines prescribed by IBM. However,
11 Plaintiff was later informed that the sale had been cancelled because he had joined a "competitor."
12 Again, Mr. ROSENOER was told that there is no definition of a competitor that IBM could refer him
13 to. Plaintiff is informed and believes, and on that basis alleges, that the value of the stock IBM
14 improperly cancelled and precluded him from selling was \$11,010.00 as of January 9, 2007.

FIRST CAUSE OF ACTION
(Recovery of Unpaid Wages)

18 14. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1
19 through 13 of this complaint.

20 15. Beginning on or about March 9, 2004 and continuing until January 1, 2007, Plaintiff
21 was employed by defendant at defendant's office located in San Francisco, California, in the City &
22 County of San Francisco.

23 16. Plaintiff's employment was pursuant to a written employment agreement. The terms
24 of that agreement as related to Plaintiff's compensation were that IBM agreed to pay Plaintiff a base
25 salary of \$185,000 and an annual bonus of \$92,500, the bonus being paid on a quarterly basis. (See
26 Exhibit A.)

17 Effective January 2, 2007, Plaintiff resigned from his employment with IBM.

Plaintiff gave notice of his intent to resign in December of 2006.

18. On January 2, 2007, at the time that Plaintiff resigned, Plaintiff had last been paid accrued wages related to his annual incentive bonus through June of 2006, and was owed wages for the remaining unpaid portion of the 2006 annual incentive bonus in the amount of \$69,375.00, as provided for in the employment agreement. (See Exhibit A.)

7 19. At the time of termination, defendant IBM failed to pay Plaintiff all of the amounts
8 due, as set forth in Paragraph 18. Defendant's failure to pay the full amount due Plaintiff on
9 termination violates the provisions of Labor Code Section 201. There is now due and owing to
10 Plaintiff the sum of \$69,375.00. Defendant has failed and refused, and continues to fail and refuse,
11 pay the amount due, and greater sums subject to proof at the time of trial.

11 pay the amount due.
12 20. Pursuant to Labor Code Section 218.5, Plaintiff requests that the court award Plaintiff
13 reasonable attorney's fees and costs incurred by him in this action.

13 reasonable attorney fees.
14 21. Pursuant to Labor Code Section 218.6, Plaintiff requests that the court award Plaintiff
15 interest on all due and unpaid wages, at the legal rate specified by Civil Code Section 3289(b),
16 accruing from the date the wages were due and payable.

WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set forth fully in the prayer of this complaint.

SECOND CAUSE OF ACTION
(Waiting Time Penalties Under Labor Code Section 203)

22. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 13 of this complaint.

23. The defendant's failure to pay wages, as alleged in Paragraph 18, was willful in that IBM informed Plaintiff that it would not pay the remaining balance of the 2006 bonus earned by Plaintiff, claiming that Mr. ROSENOER had joined a "competitor." This contention is without merit

1 or any good cause as IBM failed to provide any documentation related to Plaintiff's employment
2 agreement that allowed them to take its specious position, no one at IBM ever advised Plaintiff that a
3 condition to receive his 2006 incentive bonus precluded him from working for a "competitor," and
4 that IBM's unilaterally imposed "non-competition" agreement is invalid and against public policy
5 with reference to regular employees in California. Accordingly, IBM's failure and refusal to
6 promptly pay all of Plaintiff's wages at the time of his resignation entitling Plaintiff to penalties
7 under Labor Code Section 203, which provides that an employee's wages shall continue as a penalty
8 until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

9 24. Defendant failed to pay Plaintiff the sum of \$69,375.00 at the time of Mr.
10 ROSENOER's resignation, and has failed and refused to pay those sums for more than 30 thereafter.
11 Pursuant to the provisions of Labor Code Section 203, Plaintiff is entitled to a penalty in the amount
12 of \$7,602, which is his daily rate multiplied by 30 days.

13 WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set
14 forth fully in the prayer of this complaint.

THIRD CAUSE OF ACTION
(Breach of Employment Agreement-Cancellation of Stock Options)

25. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 13 of this complaint.

26. The terms of the offer of an employment tendered to Plaintiff by IBM expressly states:

Your management has requested you receive a stock option grant of 2,000 shares of IBM stock to be granted during one of the three annual stock option grant cycles after your employment commences. The grant is subject to appropriate senior management approvals.

(See Exhibit A, page 3, second paragraph.) Plaintiff accepted the offer and began his employment on March 9, 2004. IBM later granted the Mr. ROSENOER the promised stock option.

III

1 27. After leaving IBM, Plaintiff exercised the stock options granted to him by IBM as part
2 of his compensation while an IBM employee. Following the exercise of the stock option granted
3 Plaintiff by IBM, Mr. ROSENOER attempted to sell the stock. However, Plaintiff was later
4 informed that the sale had been improperly cancelled by IBM, once again the stated reason being that
5 Plaintiff had joined a "competitor." IBM's cancellation of the stock options granted represents an
6 express breach of the terms of IBM's offer of employment accepted by Plaintiff when he began his
7 employment on March 9, 2004.

8 28. Plaintiff is informed and believes, and on that basis alleges, that the value of the stock
9 IBM improperly cancelled and precluded him from selling was \$11,010.00 as of January 9, 2007.
10 Accordingly, as a result of IBM improper cancelling of the stock options granted, Plaintiff has been
11 damaged at least \$11,010.00, and greater sums subject to proof at the time of trial.

12 29. Plaintiff fully performed all terms associated with the offer of employment tendered
13 to him, and related to the promised grant of a stock option from IBM for 2,000 shares of IBM stock.

14 WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as set
15 forth fully in the prayer of this complaint.

PRAAYER

17 WHEREFORE, Plaintiff JONATHAN ROSENOER demands judgment against Defendants,
18 and each of them, as to his Recovery of Unpaid Wages, as follows:

25 ///
26 //

1 As to Plaintiff's Second Cause of Action for Waiting Time Penalties demands judgment
2 against defendants as follows:

- 3 1. For penalties in the amount of \$7,602.00 pursuant to Labor Code Section 203;
- 4 2. For interest on the amount;
- 5 3. For reasonable attorney's fees pursuant to Labor Code Section 218.5;
- 6 4. For costs of suit incurred herein; and
- 7 5. For such other and further relief as the court may deem appropriate.

8 As to Plaintiff's Third Cause of Action for Breach of Contract demands judgment against
9 defendants as follows:

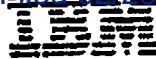
- 10 1. Compensatory damages in the amount of \$11,010.00, representing the value of the
11 stock IBM improperly cancelled and precluded Plaintiff from selling as of January 9,
12 2007.
- 13 2. For interest on the amount of \$11,010.00 from January 9, 2007;
- 14 3. For reasonable attorney's fees pursuant to Labor Code Section 218.5;
- 15 4. For costs of suit incurred herein; and
- 16 5. For such other and further relief as the court may deem appropriate.

17 DATED: December 27, 2007

LIPPENBERGER, THOMPSON, WELCH,
SOROKO & GILBERT LLP

18 By: 

19 Darin T. Judd
20 Attorneys for Plaintiff
21 JONATHAN ROSENOER



329 Caminalic Road
Research Triangle Park, NC 27709

March 5, 2004

Jonathan Rosenauer
34 Meadowhill Drive
Tiburon, CA 94920

Dear Jonathan:

Congratulations! We are delighted that you have decided to join IBM.

Attached are the details of your offer, start date and other key information for your first day of employment.

We encourage you to access IBM's Pre-employment Connections site prior to your start date. The site has been designed to provide you with the tools and resources necessary to onboard and get connected fast. Find out more by accessing the website at:

http://www.ibm.com/employment/us/newhire/regular_welcome.shtml

Please contact us immediately if you have any questions.

Sincerely,

A handwritten signature in black ink that appears to read "Karen Phipps".

Karen Phipps
Staffing, 800-334-0435 x 64474

CC June Y. Felix

Attachment

A

March 5, 2004

Attachment to the IBM offer letter to Jonathan Rosenoer for the position of Global Operational Resilience & Risk Executive reporting to June Y. Felix.

The elements of your employment offer are:

This position provides you the opportunity to participate in IBM's Solution Sales Incentive Plan. Under this incentive plan, and based on a full year of employment with IBM, your annual on-target earnings (OTE) is estimated to be \$277,500.00. This is the sum of your base salary and target incentive (T/I). This target assumes you achieve 100 percent of your Personal Contribution Objectives as set by your manager and could also include a business performance element. For your reference, your annual base salary is \$185,000.00 and your target incentive is \$92,500.00.

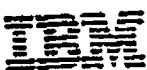
IBM's incentive plan is designed to drive results focusing on growth and market share. Over-achievement of your incentive objectives can result in significant upside earnings. Incentive payments are earned quarterly.

An internal calculation is made that determines what the base salary would be for your position if you weren't on an incentive plan. In your case, this is a monthly salary of \$15,416.70, prorated based on your start date. Those times you aren't eligible for an incentive plan include your first partial month of employment, if you are in training, in waiting for a territory assignment, or moving to a position not on an incentive plan. In addition, the internal salary calculation is also used to determine your benefits package.

The IBM company's obligation to make any payment under the Incentive Plan is subject to the condition that you are an active employee of the Company at the end of the period being measured. The exceptions are retirement under a Company Plan, approved leave of absence, death or medical disability. Full details on the terms and conditions of the IBM Sales Incentive Plan will be made available to you upon joining IBM. IBM reserves the right to modify or cancel this program at any time.

As has been discussed, it is not imperative that you relocate to the New York-area at this time. Because of the global nature of your responsibilities, you will need to travel a significant amount of time. However, we may mutually determine over the course of the next year that it would be preferable to have you relocate to the New York-area to more effectively perform in your role. In the event that we come to that conclusion, we will offer you the IBM Mobility Plan in effect at that time.

You will also have the opportunity to participate in IBM benefits. This is an exempt position which means you will not be entitled to overtime compensation. For detailed information on IBM Health Care benefits, visit the Health Care Benefits at IBM site at <http://www.ibm.com/employment/us/benefits/>.



If you have additional benefits questions after visiting our website, please contact the Employee Services Center at 1-800-796-9876. The Employee Services Center is available weekdays from 8 a.m. to noon, and 2 p.m. to 3 p.m. Eastern time. The text telephone (TTY) at 1-800-426-6537 is available from 8 a.m. to 6 p.m.

Your management has requested you receive a stock option grant of 2,000 shares of IBM stock to be granted during one of three annual stock option grant cycles after your employment commences. The grant is subject to appropriate senior management approvals. Under our plans, options are granted at a price per share determined on the grant date. Stock options are subject to the terms and conditions of the award agreement and the associated Long-Term Performance Plan, which will be provided to you along with additional details, following the date of your grant.

We anticipate your start date to be March 9, 2004.

On your first day of employment, please report to 425 Market St., San Francisco, California. You will meet with Ray Cartwright to complete your paperwork. For further details, please contact Ray at (408) 927-1475.

As is customary at IBM, this offer is contingent upon the completion of our preemployment process: verification of your application materials and your ability to work for IBM without restriction (which means you do not have non-compete obligations or other restrictive clause with your current or former employer; or any non-compete or other restrictions have been disclosed by you and resolved to IBM's satisfaction). In the event the position you are being considered for requires you to operate an IBM owned/leased vehicle, your offer is also contingent upon a review of your driving record. Your employment with IBM will not begin until you have successfully cleared this process.

Your employment is also contingent upon your compliance with the U.S. immigration law. The law requires you to complete the U.S. Government Employment Eligibility Verification form (I-9), and to provide on your first day of employment documents that verify your identity and employment eligibility. For a list of the acceptable documents, refer to the enclosed sample. You must bring the appropriate documentation with you on your first day, as you will be unable to start work without them.

On your first day of employment you will be provided with a copy of IBM's Drug Free Workplace statement as well as a copy of IBM's drug and alcohol testing policy. In addition, you will be required to sign IBM's form regarding confidential information and intellectual property. If you would like to review or discuss this document in advance, please contact me.

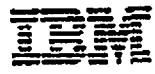
IBM employees are required to comply with IBM's Business Conduct Guidelines and to certify that they have read them. Regular IBM employees should also read the current version of the on-line booklet, About Your Job (especially the section entitled Harassment & Inappropriate Behavior) and of the various on-line About Your Benefits



(AYB) booklets, which together replace the content of all prior IBM employee handbooks. You will receive some of these documents in hard copy form during your new employee orientation. Once you have authorized access to the IBM Intranet, you will be able to read and/or print the contents of these documents, via Formal HR Documents on the HR Homepage (<http://w3.ibm.com/hr>). You may also ask your manager to print a copy for you.

Please read Attachments A&B which refer to IBM's affirmative action programs for individuals with disabilities, special disabled veterans, veterans of the Vietnam era, or Other Covered Veterans included under the amended Veterans Employment Opportunities Act of 1998.

To facilitate the process of transmitting your salary and other compensation payments to you on a timely basis, please bring, if available, your bank/financial institution account information to designate where you want your funds directly deposited via Electronic Funds Transfer.



Lori Kantor

From: Jonathan rosenoer [jrosenoer@gmail.com]
Sent: Monday, January 29, 2007 6:57 AM
To: Lori Kantor
Subject: Fwd: IBM response

----- Forwarded message -----

From: RUSSELL E MANDEL <mande!@us.ibm.com>
Date: Jan 29, 2007 4:59 AM
Subject:
To: jonathan rosenoer <jrosenoer@gmail.com>

Dear Mr. Rosenoer,

I have investigated your concerns regarding your "incentive/bonus" payout for your performance in 2006. I have found that you received your incentive through June in accordance with the Solution Sales Incentive Plan that you were on through June, 2006. I also found that you were fairly placed on the 2006 "U.S. Performance Bonus Program" when you transferred positions in June 2006; and that you were correctly denied a performance bonus. In that you joined an IBM competitor when you resigned and as the performance bonus plan document states "...at any time prior to receiving a performance bonus payment, employees who render service to any organization...that is competitive to or in conflict with the interests of IBM, as determined solely by IBM, will not be eligible for a performance bonus payment in 2007 for the 2006 plan year."

While I know this is not the answer you had hoped for, please accept my best wishes for the future.

Russell E. Mandel
Consulting Human Resources Professional
Global Employee Relations
MD 4303
Route 100, Somers, N.Y., 10589
914-766-4170 (V/1 826-4170); Fax: 914-766-8461

2/7/2007

B

NOTICE TO PLAINTIFF

A Case Management Conference is set for:

DATE: MAY-30-2008

TIME: 9:00AM

**PLACE: Department 212
400 McAllister Street
San Francisco, CA 94102-3680**

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference.

However, it would facilitate the issuance of a case management order **without an appearance** at the case management conference if the case management statement is filed, served and lodged in Department 212 twenty-five (25) days before the case management conference.

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state.

ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS

**IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A MANDATORY SETTLEMENT CONFERENCE OR TRIAL.
(SEE LOCAL RULE 4)**

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]

Superior Court Alternative Dispute Resolution Coordinator
400 McAllister Street, Room 103
San Francisco, CA 94102
(415) 551-3876

See Local Rules 3.6, 6.0 C and 10 D re stipulation to commissioners acting as temporary judges

POS-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Darin T. Judd, SBN 160475 LIPPENBERGER, THOMPSON & WELCH 201 Tamal Vista Blvd. Corte Madera, CA 94925 TELEPHONE NO.: (415) 927-5200 ATTORNEY FOR (Name): Plaintiff		FOR COURT USE ONLY F I L E D Superior Court of California County of San Francisco FEB 1 2008 <i>[Signature]</i> GORDON PARK-LI, Clerk BY: <i>Daradette Thompson</i> Deputy Clerk
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Superior Court of San Francisco County 400 McAllister Street, Civil San Francisco, CA 94102-0000		
PLAINTIFF/PETITIONER: Rosenoer		CASE NUMBER:
DEFENDANT/RESPONDENT: International Business Machines Corporation		CGC-07-470547
PROOF OF SERVICE OF SUMMONS		Ref. No. or File No.: R5902.1

1. At the time of service I was a citizen of the United States, at least 18 years of age and not a party to this action.
2. I served copies of: Civil Case Cover Sheet, Complaint, Summons, Notice to Plaintiff, ADR Packet

3. a. Party served: International Business Machines Corporation

BY FAX

b. Person Served: CT Corporation - Person authorized to accept service of process

4. Address where the party was served: 818 WEST SEVENTH STREET
LOS ANGELES, CA 90017

5. I served the party

a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) or (date): 1/31/2008 (2) at (time): 3:10 PM

6. The "Notice to the Person Served" (on the summons) was completed as follows:

c. on behalf of:

International Business Machines Corporation

under: CCP 416.10 (corporation)

7. Person who served papers

a. Name: Jimmy Lizama
b. Address: One Legal - 194-Marin
504 Redwood Blvd #223
Novato, CA 94947
415-491-0606

c. Telephone number:

d. The fee for service was: \$ 14.95

e. I am:

(3) registered California process server.
(i) Employee or independent contractor.
(ii) Registration No. 4553
(iii) County LOS ANGELES

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.
Date: 2/1/2008

Jimmy Lizama

(NAME OF PERSON WHO SERVED PAPERS)

(SIGNATURE)



ORIGINAL

1 Mitchell F. Boomer (State Bar No. 121441)
2 Janine R. Hudson (State Bar No. 206671)
JACKSON LEWIS LLP
3 199 Fremont Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 394-9400
4 Facsimile: (415) 394-9401

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

FEB 27 2008

GORDON PARK-LI, CLERK
BY: _____ Deputy Clerk

5 Attorneys for Defendant
INTERNATIONAL BUSINESS MACHINES
6 CORPORATION

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

10

11 JONATHAN ROSENOER,

Case No. CGC-07-470547

12 Plaintiff,

DEFENDANT INTERNATIONAL
BUSINESS MACHINES
CORPORATION'S ANSWER TO
PLAINTIFF'S UNVERIFIED
COMPLAINT

13 v.

14 INTERNATIONAL BUSINESS MACHINES
15 CORPORATION, a New York corporation; and
DOES 1 through 50,

Complaint Filed: December 28, 2007
Trial Date: None Set

16 Defendant.

17

18 Defendant INTERNATIONAL BUSINESS MACHINES CORPORATION
19 ("Defendant") answers Plaintiff Jonathan Rosenoer's ("Plaintiff") Complaint as follows:

20 **GENERAL DENIAL**

21 Pursuant to Code of Civil Procedure Section 431.30(d), Defendant denies,
22 generally and specifically, each and every allegation contained in Plaintiff's Unverified
23 Complaint for Damages ("Complaint").

24 **AFFIRMATIVE DEFENSES**

25 By way of affirmative defense to the allegations of the Complaint, Defendant
26 alleges as follows:

27 ///

28 ///

First Affirmative Defense

The Complaint, and all causes of action contained therein, fails to state facts sufficient to constitute a cause of action against Defendant.

Second Affirmative Defense

Plaintiff is barred from recovering any damages for lost wages, or any recovery for lost wages must be reduced, if and to the extent that Plaintiff failed to exercise reasonable diligence to mitigate his alleged damages, if any.

Third Affirmative Defense

Plaintiff's cause of action for breach of contract is barred in whole or in part on the grounds that the terms of any purported oral, written or implied agreement between Plaintiff and Defendant were materially breached and repudiated by Plaintiff, and Plaintiff is entitled to no relief upon such agreement.

Fourth Affirmative Defense

Plaintiff's Complaint, and each cause of action set forth therein, is barred in whole or in part on the grounds that, as to each and every purported oral, written, implied or other agreement alleged therein, Plaintiff failed to fulfill conditions precedent to the enforcement of any said agreement.

Fifth Affirmative Defense

Plaintiff's cause of action for breach of contract is barred in whole or in part because the contract Plaintiff seeks to enforce was properly and justifiably terminated by Defendant.

Sixth Affirmative Defense

Any recovery on Plaintiff's Complaint for written contract, is barred on the grounds that Defendant performed all of its obligations under any alleged contract.

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Seventh Affirmative Defense

The Complaint and all causes of action contained therein, are barred by the doctrine of waiver, as Plaintiff accepted all the terms and conditions of IBM's Sales Incentive Plan, and knowingly waived benefits for which he would have been eligible had he complied with the Plan's terms and conditions.

Eighth Affirmative Defense

Defendant alleges, on information and belief, that the Complaint, and all causes of action contained therein, are barred by the doctrine of estoppel.

Ninth Affirmative Defense

Any recovery on Plaintiff's Complaint with respect to the allegations of failure to pay wages in violation of California Labor Code section 201 is barred because Defendant complied with all applicable provisions of the California Labor Code, the applicable wage orders of the California Industrial Welfare Commission, and federal law.

Tenth Affirmative Defense

**Plaintiff's Second Cause of Action for waiting-time penalties under California
Labor Code section 203 is barred on the grounds Defendant acted in good faith and non-willfully.**

Eleventh Affirmative Defense

Plaintiff's Complaint and the purported causes of action alleged therein are barred because Plaintiff has received all income, wages and bonuses to which he ever has been entitled during his employ with Defendant IBM.

WHEREFORE, Defendant prays for judgment as follows:

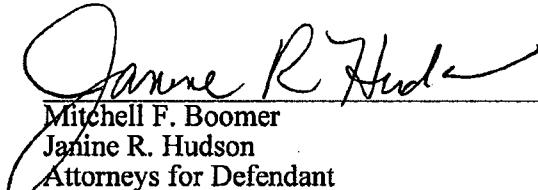
1. That Plaintiff take nothing by his Complaint;
2. That the Complaint and each cause of action be dismissed in its entirety with prejudice;
3. That Plaintiff be denied each and every demand and prayer for relief contained in the Complaint;
4. For costs of suit incurred herein, including reasonable attorney's fees, as and where permitted under California law; and

1 5. For such other and further relief as the Court deems just and equitable.
2
3

Dated: February 27, 2008

JACKSON LEWIS LLP

4 By:
5
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7


Mitchell F. Boomer
Janine R. Hudson
Attorneys for Defendant
INTERNATIONAL BUSINESS
MACHINES CORPORATION

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PROOF OF SERVICE

I, Marilou R. Barairo, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 199 Fremont Street, 10th Floor, San Francisco, California 94105; I am over the age of eighteen (18) years and am not a party to this action.

On February 27, 2008, I served the attached **DEFENDANT INTERNATIONAL BUSINESS MACHINES CORPORATION'S ANSWER TO PLAINTIFF'S UNVERIFIED COMPLAINT** in this action by placing a true and correct copy thereof, enclosed in a sealed envelope addressed as follows:

Darin T. Judd, Esq. (SBN 160475)
Eric D. McFarland, Esq. (SBN 214245)
LIPPENBERGER, THOMPSON, WELCH,
SOROKO & GILBERT LLP
201 Tamal Vista Blvd.
Corte Madera, CA 94925-1110
Tel.: (415) 927-5200
Fax: (415) 927-5210

Attorneys for Plaintiff
JONATHAN ROSENOER

BY MAIL: United States Postal Service by placing sealed envelopes with the postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[] **BY HAND DELIVERY:** I caused such envelope to be delivered by hand to the above address (via Western Messenger).

[] **BY OVERNIGHT DELIVERY:** I caused such envelope to be delivered to the above address within 24 hours by overnight delivery service (via Overnite Express).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct; executed on February 27, 2008, at San Francisco, California.

Belinda Vega
Belinda Vega